

# Louisiana Law Review

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Volume 41 | Number 1  
*Fall 1980*

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### Repository Citation

Alain A. Levasseur, *Bridging the Channel*, 41 La. L. Rev. (1980)  
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## BRIDGING THE CHANNEL

*Alain A. Levasseur\**

What we shall do if we are forced into the Common Market and have to deal with Continental legislation and decisions, I just do not know. We shall have to learn a lot about not only European law but more important about the habits of mind of European lawyers which I suspect are more theoretical and less practical than our own.<sup>1</sup>

Soon after Lord Reid had left this question partially unanswered, Great Britain became a member of the European Economic Community, brought, at last, to the shores of the continent. The limelight which, until then, was mainly focused on the economic and political problems of European integration now had to include within its coverage a third major component part of integration: law. The additional dimensional problem of British membership in the EEC raised the very sensitive issue which centuries of hostility and rapprochement, indifference and mutual concern, had not yet had to face—that is, whether, the civil law and the common law systems could find a *modus vivendi* under economic and political constraints. Indeed, European community law is more than a few treaties, it is more than a series of regulations or directives, it is more than judicial decisions from a European court; it is a system of law. Moreover, it is a civil law system identified by its particular style of drafting legislation and its methodology of legal reasoning.

### COMMON AND CIVIL LAW APPROACHES TO LEGISLATION AND LEGAL REASONING

The attitude of the common lawyer vis-à-vis legislation is one deeply rooted in his historical past which can be characterized as one of happenings, a taught tradition of decisions, “a tradition of applying judicial experience to the decision of controversies, . . . a tradition . . . shaped in its beginnings as a quest for reconciling authority with reason, imposed rule with customs of human conduct and so the universal with the concrete.”<sup>2</sup> The *Corpus Juris Civilis*, the magnifi-

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1. Reid, *The Judge as Law Maker*, 12 J. SOC'Y PUB. TCHRS. L. 22, 28 (1972).
2. R. POUND, *What is the Common Law?*, in THE FUTURE OF THE COMMON LAW 18 (1937).

cent compilation of Roman law by the Emperor Justinian and regarded as the supreme expression of statutory law relegating custom and tradition to a subsidiary role, never acquired great stature in England, where it succumbed easily to the vigorously independent and meticulously pervasive development of judge-made law. The ever-growing role and powers of the King's Courts, in the Middle Ages in particular, found no containment, but rather an inducement, in the paucity of royal enactments. Thus the judges came to look upon themselves and the common law they were administering as a shield protecting the governed from the government, be it the executive, the legislative, or an alliance of both. The common law judge is independent; "[h]e wields the royal authority to do justice. He is not accountable to administrative superiors. In the words attributed by Coke to Bracton, he decides under God and the Law."<sup>3</sup> The courts built their supremacy on "a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of seeking to refer everything back to supposed universals."<sup>4</sup> Legislators are presumed to be incapable of rising above private interests to aim for the good of all in pursuit of a goal or an ideal conceived more as the reason of State than as the end result of cumulated human interests. Therefore, statutes are seen as deviations, alterations, or departures from the cohesive and well-structured scheme of the common law, so that "the business of the judges is to keep the mischief of [the Parliament's] interference within the narrowest possible bounds."<sup>5</sup> Statutory law is *lex specialis*. The British judges

regarded it as dangerous and unnatural to prescribe the outcome of comparable cases in advance by making general regulations to cover the whole area of life; "we will cross the bridge when we come to it." Thus English statutes were originally sporadic *ad hoc* enactments which as legal sources had much less force than the unwritten Common Law which had been developed by the judges through the centuries and which covered all areas of the law equally. The judges saw statutes as being an evil, a necessary evil, no doubt, which disturbed the lovely harmony of the Common law . . . .<sup>6</sup>

This traditional approach to statutes is still deeply carved in the minds of 20th century judges who see in the common law an "old

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3. *Id.* at 15.

4. *Id.* at 19.

5. F. POLLOCK, *ESSAYS IN JURISPRUDENCE AND ETHICS* 85 (1882).

6. K. ZWEIGERT & H. KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 269 (T. Weir trans. 1977).

fashioned, hand-made, expensive, quality good[]"<sup>7</sup> and belittle statutes as

the brash products of modern technology. If you think in months, want an instant solution for your problems and don't mind that it won't wear well, then go for legislation. If you think in decades, prefer orderly growth and believe in the old proverb more haste less speed, then stick to the common law. But do not seek a middle way by speeding up and streamlining the development of the common law.<sup>8</sup>

The common law approach to legislation is in sharp contrast with the civil law system belief that justice, as the essence of the Law, is best achieved through enacted law which is but the "solemn expression of legislative will."<sup>9</sup> Such an attitude is in agreement with democratic principles; it is also justified by the fact that state and administrative bodies are "without doubt, better placed . . . to coordinate the different sectors of social activity and to determine where the common interest lies. . . . [L]egislation . . . appears to be the best means of enunciating the rules needed at a time when the complexity of social relations demands that precision and clarity be paramount."<sup>10</sup> This primacy attached to legislation explains why "in the tradition of the civil law the judge is a part of the administrative hierarchy,"<sup>11</sup> an authority under a power bound "to regard statutes in the light of the thesis of the civil law that its precepts are statements of general principles, to be used as guides to decision."<sup>12</sup> The lawmaking power rests in a representative body which formulates the popular will and thus raises legislation to the apex of the multi-faceted pyramid of the sources of law devised and arranged in a dogmatic and systematic pattern. In the common law tradition

[t]here is no systematic, hierarchical theory of sources of law: legislation, of course, is law, but so are other things, including judicial decisions . . . . The attitudes that led France to adopt the metric system, decimal currency, legal codes, and a rigid theory of sources of law, all in the space of a few years, are still basically alien to the common law tradition.<sup>13</sup>

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7. Reid, *supra* note 1.

8. *Id.*

9. LA. CIV. CODE art. 1.

10. R. DAVID & J. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 86 (1968).

11. R. POUND, *supra* note 2, at 15.

12. H. STONE, *The Common Law In The United States*, in THE FUTURE OF THE COMMON LAW 131 (1937).

13. J. MERRYMAN, THE CIVIL LAW TRADITION 26 (1969).

Just as one's outward behavior, way of speech, and body control are a tangible portrait of one's intellectual, emotional and moral senses, similarly, the styles and techniques followed by the common law, on the one hand, and the civil law, on the other, in drafting statutes are but a betrayal of the deeply-rooted attitudes and understandings of these two major legal systems vis-à-vis legislation.

If metaphors are neither considered out of place nor looked upon as disrespectful, possibly the artful expression of the civil law and the common law styles of drafting statutes may be found in cubism and pointillism.

The civil law style is but the materialization of a certain philosophical view of legislation as being

not a pure act of power [but] . . . an act of wisdom, justice and reason. The legislator does not exercise authority as much as he serves a sacred office. He must not forget that legislation is made for men, and that men are not made for legislation; . . . [that] it is impossible to anticipate all the drawbacks that practice alone can reveal, . . . that it would be absurd to surrender one's self to a belief in absolute perfection in matters susceptible of only relative goodness, . . . [that] [t]o anticipate everything is a goal impossible of attainment . . . . In any case, how can one fetter the movement of time? . . . How can one know and calculate in advance what only experience can reveal? Can a forecast ever encompass matters that thought cannot reach?<sup>14</sup>

Consequently, the civil law style of drafting parallels, in a sense, the cubist painter's "monochromatic expression of natural forms in terms of simplified planes and lines and basic geometric shapes sometimes organized to depict the subject simultaneously from several points of view . . . ."<sup>15</sup> In legal terms, the civilian technique of drafting statutes is "to set, by taking a broad approach, the general propositions of the law, to establish principles which will be fertile in application, and not to get down to the details of questions which may arise in particular instances."<sup>16</sup> The objective is to provide the courts with principles of broad application and to refrain from locking the judges in a straitjacket of details. It is, then, a paradox of history that the French Revolution born, to some extent,

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14. Levasseur, *Code Napoleon or Code Portalis?*, 43 TUL. L. REV. 762, 767-69 (1969).

15. This is Webster's definition of "cubism." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 550 (13th ed. 1964).

16. Levasseur, *supra* note 14, at 769.

out of the deep concern of protecting the people from the equity of Parliaments, ended up devising an approach to legislation such that it was to leave "[a] host of things . . . to the province of custom, the discussion of learned men and the decision of judges . . . . It is for the judge and the jurist, imbued with the general spirit of the laws, to direct their application."<sup>17</sup> The civilian legislator draws the simplified lines and shapes of the will of the people and entrusts to the judge the ultimate care of using his palette to give life to a monochromatic expression of legislative will. The mutual trust and reciprocal confidence in the ultimate responsibility of administering justice has been most provocatively, and somewhat ambiguously, phrased by Esmein in terms that common lawyers could claim as theirs; "[c]ase law is the true expression of the civil law; it is the real and positive law, as long as it has not been changed."<sup>18</sup>

By contrast, the drafting technique of the common law legislator resembles the extreme care and minuteness of a Seurat and the school of pointillism, whose artistic expression consisted in "applying dots or tiny strokes of color elements to a surface so that when seen from a distance the dots or strokes blend luminously together."<sup>19</sup> The common law approach to the art of drafting statutes is shaped by "a frame of mind which habitually looks at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions."<sup>20</sup> The common law's faith in experience and concern for realism views law as "a living organism of immense complexity," and appraises its logic as "a practical logic, not concerned with the absolute, but with concrete reality; the reality, however, must be regulated by rule."<sup>21</sup> Statutes are, thus, "elaborate to the point of complexity; detailed to the point of unintelligibility; yet strangely uninformative on matters of principle."<sup>22</sup>

Continental observers are struck by the pedantic and prolix detail in which statutes deal with the simplest matters, obviously so as to make it more difficult for the judges to get around them: where a continental legislator would be satisfied with a single comprehensive notion, the English legislator, simply in

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17. *Id.*

18. Herman, *Excerpts From a Discourse on the Code Napoleon by Portalis and Case Law and Doctrine by A. Esmein*, 18 *LOY. L. REV.* 23, 33 (1971).

19. "Pointillism" is thus defined by Webster's. *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* 1750 (13th ed. 1964).

20. R. POUND, *supra* note 2, at 18-19.

21. L. WRIGHT, *The Common Law in its Old Home*, in *THE FUTURE OF THE COMMON LAW* 66 (1937).

22. D. LASOK & J. BRIDGE, *AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES* 44 (1976).

order to bind the judges, will use *five* specific terms, without adding anything to the meaning. In Pollock's view, the art of legislation towards the end of the eighteenth century was "to pile up as many words as possible, significant and insignificant, on the chance that in their multitude the intention of the enactment might find safety" . . . ; it must be said, with all respect, that one can quite often find traces of this attitude even in modern legislation.<sup>23</sup>

These two opposite conceptual views of legislation as a source of law, and as an art, led to two basically different methods of interpretation of statutory law.

Roscoe Pound has admirably synthesized the civil law method of interpretation in these words:

The civilian is at his best in interpreting, developing, and applying written texts. From the time that the Law of Citations gave legislative authority to the writings of the great jurists, he has thought of the form of the law as typically that of a code, ancient or modern. His method has been one of logical development and logical exposition of supposedly universal enacted propositions. His whole tradition is one of the logical handling of written texts.<sup>24</sup>

The civilian jurist, imbued with the spirit of the laws, will approach a statute as the cornerstone of the edifice he is called upon to build by interpretation, and he will quite naturally presume that the legislator, when formulating principles, has meant for the judge to extract all their "substantifique moelle."<sup>25</sup> Hence, having been entrusted by the legislator with the principles most favorable to the common good, the civilian judge can go about his task to consider men as individuals, where the legislator considered them en masse.

Pound writes of the common-law lawyer's traditional suspicious approach to legislation:

[T]he common-law lawyer is at his worst when confronted with a legislative text. His technique is one of developing and applying

23. K. ZWEIGERT & H. KÖTZ, *supra* note 6, at 270 (emphasis original).

24. R. POUND, *supra* note 2, at 17-18. In addition:

[T]he judge's science is to put . . . into effect [the principles formulated by the legislator], to diversify them, and to extend them, by means of wise and reasoned application, to private causes; to examine closely the spirit of the law when the letter kills; and not to expose himself to the risk of being alternately slave and rebel, and of disobeying because of a servile mentality.

Levasseur, *supra* note 14, at 772.

25. F. RABELAIS, *Gargantua* in A. LAGARDE & L. MICHARD, XVI<sup>e</sup> SIÈCLE, 'LES GRANDS AUTEURS FRANCAIS DU PROGRAMME (1970).

judicial experience. It is a technique of finding the grounds of decision in the reported cases. It is a technique of shaping and reshaping principles drawn from recorded judicial decisions.<sup>26</sup>

The intention of a statute must be ascertained from the statute itself, and the surrounding events can be resorted to only when they are matters of common knowledge. A statute is the adapted and relative formulation of the law to a narrowly circumscribed set of interests and circumstances. To extend such a statutory formulation by analogical reasoning to unprovided-for situations would be tantamount to usurping the political functions of the legislative branch of government by presuming that the legislator meant to subject to the same equal treatment interests which, apparently, it had meant not to include. The force of law of the text explains and justifies that it be restricted to its letter.<sup>27</sup>

In addition, the formulation is spent when the imperative in such text is spent. The text of the law is its own barrier to growth. It is a thing-in-itself and is not both thing-in-itself and thing-for-other. . . . [I]n Anglo-American law the jurist turns his back on the formulated law when it reaches the limit of its command or its instruction . . . . The received doctrine is that judicial determinations and not legislative formulations are the basis for analogical development of law.<sup>28</sup>

The old and somewhat worn out rivalry between the civil law and the common law, although not as newsworthy and captivating as the politically sensitive issue of Britain's membership in the Common Market<sup>29</sup> was, nonetheless, a fundamental one: would the civil law and the common law happily marry under a community of economic and political gains and develop into a community of thought? Or would they live a free, willing union, converging when common interests prevailed but diverging as soon as nationalistic penchants, be they historical, social, philosophical, resurfaced?

#### WORKING OUT A MODUS VIVENDI

After having been left holding the knocker to the door of the European Community for a long and trying period, Great Britain is

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26. R. POUND, *supra* note 2, at 18.

27. In the words of Lord Devlin: "Statutes are not philosophical treatises and the philosophy behind them, if there is one, is often half-baked." Devlin, *Judges and Law Makers*, 39 MOD. L. REV. 1, 14 (1976).

28. Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenback*, 40 TUL. L. REV. 487, 488 (1967).

29. Britain's membership came in 1973.

now one of the nine. Has it been convinced by the realization that "[i]f our imagination is strong enough to accept the vision of ourselves as parts inseverable from the rest, and to extend our final interest beyond the boundary of our skins, it justifies the sacrifice even of our lives for ends outside of ourselves?"<sup>30</sup>

A principle of European community law is that national courts are to apply and interpret community law since the latter is an integral part of each member state's internal legal order. The British Parliament adopted this principle by passing the European Communities Act of October 17, 1972. This Act provides in its Section 2 of Part I that

all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and be enforced, allowed and followed accordingly.<sup>31</sup>

Henceforth, the normative sources of European community law, clothed in a civil law apparel, were to be applied by the British judiciary. This challenge was tailored to the prominence of the British Bench, as the Master of the Rolls<sup>32</sup> admirably described in a 1974 decision:

[W]hen we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back . . . . Any rights or obligations created by the Treaty are to be given legal effect in England without more ado . . . . In future, in transactions which cross the frontiers, we must no longer speak or think of English law as something on its own. We must speak and think of Community law . . . . This means a great effort for the lawyers. We have to learn a new system . . . .

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30. A. LIEF, *THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES* xviii (1929).

31. European Communities Act, 1972, c. 68, § 1 at 1948.

32. In a recent article, Lord Denning's influence, as Master of the Rolls, was said to come

from self-demotion. In 1957, he was sent to the house of lords, but in 1962, he stepped down to the appeal court because he had found himself in a minority in the Lords too often. . . . Might not a developing tradition of wide legal interpretation go astray with judges of lesser wisdom? . . . it is the job of great judges to be adventurous. If they go wrong, the House of Lords or Parliament can put them right again . . . .

The Economist, Jan. 27, 1979, at 18.

What a task is thus set before us! The Treaty is quite unlike any of the enactments to which we have become accustomed. The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. In consequence, the judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation—which was not foreseen—the judges hold that they have no power to fill the gap. To do so would be a “naked usurpation of the legislative power”. . . .

How different is this Treaty! It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by judges, or by regulations or directives. It is the European way. . . . [W]hat are the English courts to do . . . ? They must follow the European pattern. No longer must they examine the words in meticulous detail . . . They must look to the purpose or intent . . . they must divine the spirit of the treaty and gain inspiration from it.”<sup>33</sup>

Two years later, Lord Denning pursued his adventurous path into the European way and shared his understanding of the European pattern:

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33. *Bulmer v. Bollinger* [1974] 2 CMLR 91, 111-20. There was a “precedent,” however, to Lord Denning’s opinion, formulated more than four hundred years before. In 1574, it was opined that

*it is not the words of the law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, quia ratio legis est anima legis. And the law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive . . . .*

*Eyston v. Studd*, 75 Eng. Rep. 688, 695 (1514).

[The members of the European Court] adopt a method which they call in English by strange words—at any rate they were strange to me—the “schematic and teleological” method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit—but not the letter—of the legislation, they solve the problem by looking at the design and purpose of the legislature—at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly . . . . To our eyes—shortsighted by tradition—it is legislation, pure and simple. But, to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended.<sup>34</sup>

The gauntlet was thrown! How much longer could the British courts continue wearing two hats and pursuing two different approaches to legislation? “Since it is plainly unsatisfactory to combine within one legal system . . . two methods of interpretation, one of them will have to give way, and my bet is that the European principle and practice will prevail.”<sup>35</sup> If it is to prevail, it will not be without the common law method of interpretation putting on a fight. Common law is so much a “tradition of ideals, method, . . . and principles,”<sup>36</sup> so very deeply rooted in its history and present mores that it will stand up firm and determined against this new challenge hurled by its old enemy, Rome.

Champions of the common law are many and the challenge was accepted.

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34. *Buchanan v. Babco Forwarding & Shipping* [1977] 2 CMLR 455, 458-59. Lord Denning then proceeded to write:

I see nothing wrong in this. Quite the contrary. It is a method of interpretation which I advocated long ago . . . . In interpreting the Treaty of Rome “which is part” of our law we must certainly adopt the new approach. Just as in Rome, you should do as “Rome does.” . . . Even in interpreting our own legislation, we should do well to throw aside our traditional approach and adopt a more liberal attitude. We should adopt such a construction as will promote the . . . legislative purpose underlying the provision . . . .

*Id.* at 459.

35. Scarman, *Law of Establishment in the European Economic Community*, 24 N. IR. L. Q. 61, 71 (1973).

36. R. POUND, *supra* note 2, at 8.

[T]he assumed and often repeated generalisation that English methods are narrow, technical and literal, whereas continental methods are broad, generous and sensible seems to me insecure at least as regards interpretation of international Conventions . . . . [T]here is no universal wisdom available across the Channel upon which our insular minds can draw. We must use our own methods following "Lord MacMillan's" prescription taking such help as existing decisions give us.<sup>37</sup>

More forceful than Lord Wilberforce, Viscount Dilhorne wrote that he knew

of no authority for the proposition that one consequence of this country joining the European Economic Community is that the courts of this country should now abandon principles as to construction long established in our law. The courts have rightly refused to encroach on the province of Parliament and have refused to engage in legislation. To fill the gap which in his opinion existed, Lord Denning rightly said would in our eyes be "legislation, pure and simple."<sup>38</sup>

The issue appears to be essentially a matter of distribution of functions between the legislator and the judiciary as well as an understanding of their respective roles in the formulation of the law. Supposing this as the case, then it is within the power of the legislative branch of the British government to end these Don Quix-

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37. *Buchanan v. Babco Forwarding & Shipping*, [1978] 1 CMLR, 156, 160-61 (opinion of Lord Wilberforce).

38. *Buchanan v. Babco Forwarding & Shipping* 1 CMLR 156, 164 (opinion of Viscount Dilhorne). Even among his peers on the Court of Appeal, Lord Denning found some resistance to his liberal approach. Evidence of the resistance may be found in the words of Lord Justice Cumming-Bruce, in *Davis v. Johnson*, [1978] 1 ALL ER 841, 885. He wrote:

With all respect I am not able to accept [Lord Denning's] reliance on reference to Parliamentary proceedings as an aid to construction of the words in an Act of Parliament. I take the law to be that a report to Parliament is not relevant save for the purpose of appreciating the mischief which the Act seeks to prevent or remedy. I am not alarmed by the criticism that I am a purist who prefers to shut his eyes to the guiding light shining in the reports of Parliamentary debates in the Hansard. The task of this court is to decide what the words of the Act mean. The subject should be able, as in the past, to read the words of an Act and decide its meaning without hunting through Hansard to see whether the Act has a different meaning from that which is to be collected by application of the subtle principles of construction that this court has worked out over the last three centuries. If the words of an Act fail to express the intent that Parliament intended, Parliament in its sovereign power can amend the Act. An Act means what the words and phrases selected by the parliamentary draftsmen actually mean, and not what individual members of the two Houses of Parliament may think they mean.

otes and vainless debates by devising a new technique of legislative drafting. By rethinking the style, structure and the overall philosophy of statutes, the British Parliament could bring about a convergence of the common law and the civil law methods in all domains of its constitutional authority. The Members of Parliament need be convinced that the judges can be trusted to give a subjective meaning to statutes and that the antiquarian suspicion the Parliament harbored against the judiciary should give place to a fruitful cooperation inspired by mutual respect. In this line of thought one may wonder if a "formal" rapprochement between the common law and the civil law traditions is not in the offing as a movement of reform is under way in Great Britain.